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Antitrust Law -- Environmental Law -- Use of Antitrust Law as Environment Remedy for Suppression of Pollution Control Technology -- In Re Multidistrict Vehicle Air Pollution M.D.L. No.31

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enactments that the federal government should defer to states for primary pollution enforcement.

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Antitrust Law—Environmental Law—Use of Antitrust Law as Environmental Remedy for Suppression of Pollution Control Technology—*In re Multidistrict Vehicle Air Pollution M.D.L. No. 31.*[1]—Defendants, the automobile industry's "Big Four" and the industry trade association,[2] participated in a joint research-and-development effort aimed at solving the problem of automobile-caused air pollution.[3] In 1953 the industry set up the Vehicle Combustion Products Committee to facilitate joint research, and two years later a cross-licensing agreement was added under which any discoveries would be equally available to all participants.[4] After industry critics charged that the joint effort was retarding, not speeding, the anti-pollution effort, a federal grand jury was convened.[5] The Justice Department subsequently filed a civil antitrust suit against defendants,[6] charging them with a violation of section 1 of the Sherman Act.[7] The complaint alleged that defendants and other companies (named as co-conspirators but not as defendants) had conspired to eliminate competition among themselves in the research, development, manufacture, installation and publicity of air pollution control devices and in the purchase of patents and patent rights covering such equipment.[8] The suit was settled by a consent decree under which the defendants, without admitting any illegal practices, agreed to cease any anticompetitive activity.[9] In approving the decree, the district court denied the

[1] 5 Trade Reg. Rep. (1973 Trade Cas.) ¶ 74,819, at 95,647 (C.D. Cal. Nov. 21, 1973), on remand from 481 F.2d 122 (9th Cir. 1973).

[2] The defendants were General Motors Corp., Chrysler Corp., American Motors Corp., Ford Motor Co. and the Automobile Manufacturers' Association, Inc.

[3] The concern over automobile emissions was intensified in 1950, when Dr. Arlie Haagen-Smit, a California biochemist, discovered the link between automobile exhaust gases and smog. Esposito, Vanishing Air 36 (1970) (the Nader task-force report on air pollution).

[4] Nader, Unsafe at Any Speed 154 (1965). See generally Green, The Closed Enterprise System 254-63 (1972) (the Nader task-force report on antitrust enforcement); L. Jaffe & L. Tribe, Environmental Protection 141-80 (1971).

[5] Green, supra note 4, at 255.

[6] For a description of the complaint, see United States v. Automobile Mfrs. Ass'n, [1961-1970 Transfer Binder] Trade Reg. Rep. ¶ 45,069, at 52,705 (1969) [hereinafter cited as Complaint].

[7] 15 U.S.C. § 1 (1970). The section reads, in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

[8] See Complaint, supra note 6, at 52,705.

[9] United States v. Automobile Mfrs. Ass'n, 307 F. Supp. 617 (C.D. Cal. 1969), aff'd mem. sub nom. New York v. United States, 397 U.S. 248 (1970). The text of the decree is reported in 1969 Trade Cas. ¶ 72,907, at 87,456. In substance it prohibited the defendants

petitions of individuals, states, and local governments seeking to intervene in the proceeding.[10]

Plaintiffs subsequently filed civil antitrust actions, alleging that they had suffered and were continuing to suffer damage as a result of air pollution caused by vehicles manufactured by defendants that would have been equipped with pollution control devices, but, because of the conspiracy, had not been so equipped. The suits, seeking treble damages under section 4,[11] and injunctive relief under section 16,[12] of the Clayton Act, were filed by state and local governments in their proprietary capacities for alleged damage to government property,[13] by states in their *parens patriae* capacities for alleged damage to their general economies and environments,[14] and by individuals representing classes including all farmers, all persons sustaining damage from air pollution, and all persons living in the United States.[15] Equitable relief sought included a mandatory injunction to force the defendants to install pollution control devices on cars produced without them, and restitution to state and local governments of money spent on the air pollution problem. The cases were consolidated for pretrial proceedings in the United States District Court for the Central District of California.[16]

Defendants argued that the suits should be dismissed on the

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from conspiring to restrain the development of pollution-control devices; from restraining the individual decisions of companies as to when pollution-control devices would be installed; from refusing to file individual statements with government agencies concerned with pollution and from filing joint statements unless specifically requested to do so; from continuing the cross-licensing agreement; from exchanging secret information on pollution control or patent rights on devices; and from dealing jointly with independent developers of pollution-control devices. Id. at 87,457-58.

[10] United States v. Automobile Mfrs. Ass'n, 307 F. Supp. 617 (C.D. Cal. 1969), aff'd mem. sub nom. New York v. United States, 397 U.S. 248 (1970), noted in 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 408 (1970).

[11] 15 U.S.C. § 15 (1970).

[12] 15 U.S.C. § 26 (1970). The relief sought differed from the traditional prohibitive injunction barring anticompetitive conduct, which had effectively been obtained by the Government in its consent decree. See note 9 supra.

[13] The alleged damages included expenses incurred for repair of damaged property, and for medical care in government medical facilities for persons suffering from pollution-caused disease. Brief for Appellees at 6-7, In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973) [hereinafter cited as Brief for Appellees].

[14] Appellees relied on Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (environment), and Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) (general economy). Brief for Appellees, supra note 13, at 7. After the suits were filed, the Supreme Court held that damages to the general economy are not recoverable in a *parens patriae* action under the antitrust laws. Hawaii v. Standard Oil Co., 405 U.S. 251 (1972). For a discussion of a state's standing to sue to protect its natural resources, see Note, 15 B.C. Ind. & Com. L. Rev. 795 (1974).

[15] See In re Motor Vehicle Air Pollution Control Equip., 52 F.R.D. 398, 402-03 (C.D. Cal. 1970).

[16] In re Motor Vehicle Air Pollution Control Equip., 311 F. Supp. 1349 (Jud. Panel Mult. Lit. 1970). Under 28 U.S.C. § 1407 (1970), "civil actions involving one or more common questions of fact" that are pending in different districts "may be transferred to any district for coordinated or consolidated pretrial proceedings."

grounds that plaintiffs lacked standing to sue under the Clayton Act. The district court denied the motion to dismiss.[17] Noting that "[i]n terms of the development of the anti-trust laws, the concept of source of injury alleged herein is rather new . . . ," the court nevertheless concluded that "[p]laintiffs may fail in their proof, but until then, they should be given the benefit of employing 'any available remedy to make good the wrong done.' "[18] However, of the classes of individuals, only the class of farmers met the requirements of Rule 23 of the Federal Rules of Civil Procedure.[19] On appeal,[20] the Ninth Circuit HELD: plaintiffs did not have standing to sue for damages, but they did have standing to sue for equitable relief.[21] In denying standing to sue for damages, the court of appeals said that only the class of farmers had alleged damage to "commercial interest," the only kind of damages recoverable under the Clayton Act.[22] The farmers could not recover, however, because they were not within the "target area" of the antitrust conspiracy.[23]

On remand,[24] the district court considered the availability of equitable relief. Defendants argued that such equitable relief was not available under the antitrust laws. The district court HELD: equitable relief was not available because the damage suffered by plaintiffs was not the result of a violation of the antitrust laws.[25] The court reasoned that the alleged conspiracy was "one addressed not to the marketplace, but rather to joint tortfeasors refusing, or delaying in, the abatement of an existing and continuing public nuisance."[26] Smog was not a result of any anticompetitive activity but rather the result of the competition between the defendants and the resulting "monumental use" of the internal-combustion engine.[27] The court said that plaintiffs had proceeded under the wrong theory

[17] In re Motor Vehicle Air Pollution Control Equip., 52 F.R.D. 398 (C.D. Cal. 1970). See Note, 12 B.C. Ind. & Com. L. Rev. 686 (1971).

[18] 52 F.R.D. at 401.

[19] Id. at 404. The court of appeals later directed the district court to re-examine the propriety of the classes denied certification in light of the holding regarding standing to sue for equitable relief. 481 F.2d at 132. On remand, the district court did not find it necessary to reach the issue, denying plaintiffs the right to any relief under the antitrust laws.

[20] The interlocutory appeal was taken under 18 U.S.C. § 1292(b) (1970).

[21] In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 130-31 (9th Cir. 1973).

[22] Id. at 126. The Ninth Circuit followed the Supreme Court's decision in Hawaii v. Standard Oil Co., 405 U.S. 251 (1972), which was decided after the district court had ruled on the question.

[23] 481 F.2d at 129.

[24] In the district court, the remanded cases were consolidated with an equitable action filed by eighteen states that had attempted to invoke the original jurisdiction of the Supreme Court. The Supreme Court had declined to take jurisdiction, remitting the action to a district court. Washington v. General Motors Corp., 406 U.S. 109 (1972).

[25] In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 5 Trade Reg. Rep. (1973 Trade Cas.) ¶ 74,819, at 95,647 (C.D. Cal. Nov. 21, 1973). The ruling came after a pre-trial hearing under Fed. R. Civ. P. 16 on the availability of equitable relief.

[26] 1973 Trade Cas. at 95,652.

[27] Id. at 95,651.

of recovery. "Assuming, without deciding, that such a conspiracy (*i.e.* maintaining a nuisance) is unlawful, the redress for such unlawful conduct is not found in the antitrust laws."[28]

This note will examine the decisions of the court of appeals, and of the district court on remand, in light of antitrust precedents and policy. It will first consider the alleged antitrust violation under the "rule of reason" standard. Then assuming *arguendo* that a violation was committed, it will consider the availability of damages and equitable relief. Finally, it will consider the propriety of the decisions in light of the proper role of the courts vis-à-vis the legislature.

THE ALLEGED VIOLATION

The principal case (hereinafter referred to as *Vehicle Air Pollution*) is the first in which a joint research-and-development project was challenged as violating the Sherman Act solely because of an alleged reduction in competitive incentive.[29] The Act condemns "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . ."[30] At common law, contracts in restraint of trade were considered illegal and unenforceable, although the law imposed no other penalties.[31] The Sherman Act extended the prohibition to noncontractual arrangements,[32] and provided for criminal penalties, as well as civil remedies available to the government and to private plaintiffs.[33] While the bill was under consideration by the Senate, Senator Sherman said:

> This bill [seeks] only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer. It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combination. . . .
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> I admit that it is difficult to define in legal language the precise line between lawful and unlawful combina-

[28] Id. at 95,652. It should be noted that the court's suggested use of public nuisance might pose some difficulties, at least to the extent that private plaintiffs are involved. See Note, 15 B.C. Ind. & Com. L. Rev. 795, 808 n.75 (1974).

[29] Andrews, Antitrust Law Meets the Environmental Crisis—An Argument for Accommodation, 1 Ecology L.Q. 840, 849 (1971). See generally Currie, Cooperative Research and the Antitrust Law, 36 J. Pat. Off. Soc'y 690 (1954); Marquis, Compatibility of Industrial Joint Research Ventures and Antitrust Policy, 38 Temp. L.Q. 1 (1964); Turner, Patents, Antitrust and Innovation, 28 U. Pitt. L. Rev. 151 (1966).

[30] 15 U.S.C. § 1 (1970).

[31] Apex Hosiery Co. v. Leader, 310 U.S. 469, 497 (1940) (dictum).

[32] 15 U.S.C. § 1 (1970).

[33] Sherman Act, ch. 647, §§ 1, 2, 4, 7, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2, 15, 25, 26 (1970).

> tions. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law . . . .[34]

The Supreme Court has recognized the common law basis of "restraint of trade" as used in the Act,[35] saying that the Act was aimed at the same evil with which the common law was concerned: "the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions."[36]

Although some practices, such as price-fixing, are illegal per se,[37] in other cases the courts will apply the "rule of reason."[38] In applying the rule of reason, the courts look to whether the conduct has in fact lessened competition.[39] To make that determination the court must ordinarily consider

> the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpet facts and to predict consequences.[40]

The initial question in considering whether the joint research venture of the automobile manufacturers was illegal under the Sherman Act is whether it would be considered a per se violation, or whether it would be judged under the "rule of reason." If it were considered a per se violation, then it would be illegal even if it speeded the pace of pollution research, but under the "rule of reason" it would be a violation only if it in fact reduced competition in that area. The precedents suggest that such agreements are not per se violations of the Sherman Act.

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[34] 21 Cong. Rec. 2457, 2460 (1890).

[35] Standard Oil Co. v. United States, 221 U.S. 1, 55 (1911).

[36] Id. at 58.

[37] See, e.g., United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (price fixing); Timkin Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (division of markets); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899) (same). See generally Van Cise, The Future of Per Se in Antitrust Law, 50 Va. L. Rev. 1165 (1964).

[38] United States v. American Tobacco Co., 221 U.S. 106, 179 (1911); Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).

[39] United States v. Topco Associates, Inc., 405 U.S. 596, 607 (1972); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

[40] Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

In the *Gasoline Cracking Case,*[41] the Supreme Court considered an arrangement between three oil companies to share patents relating to the process of "cracking" crude oil into gasoline. The government charged that the arrangement violated the Sherman Act. Although the Court found for the defendants, it noted that such agreements "must be carefully examined in order to determine whether violations of the Act result."[42] The Court said: "[A]n agreement for cross licensing . . . violates the Act only when used to effect a monopoly, or to fix prices, or to impose an otherwise unreasonable restraint upon interstate commerce."[43] In a subsequent case, *United States v. Line Material Co.,*[44] the Court suggested in dictum that joint research ventures, other than those used to effect an otherwise per se violation, would be judged by a "rule of reason" standard. In that case defendants' royalty-free cross-licensing agreement was held to be a per se violation because it was used to implement a price-fixing scheme. The Court went on to state:

> The development of patents by separate corporations or by cooperating units of an industry through an organized research group is a well known phenomenon. However far advanced over the line inventor's experimentation this method of seeking improvement in the practice of the arts and sciences may be, there can be no objection, on the score of illegality, either to the mere size of such a group or the thoroughness of its research.[45]

The legality of a patent arrangement such as the one involved in *Vehicle Air Pollution* was summarized by the Ninth Circuit Court of Appeals in *Cutter Laboratories, Inc. v. Lyophile-Cryochem Corp.:*[46]

> Patent pools and cross-licensing agreements, when formed in a legitimate manner for legitimate purposes, are not illegal in themselves. . . . It is only where the agreements are used to effect a restraint of trade or a monopoly that they violate the law . . . .[47]

In other situations in which patent pooling and cross-licensing agreements have been held to violate the antitrust laws, they were used to reduce competition[48] or to achieve a monopoly.[49]

However laudable the purposes of a joint research venture when begun, though, the effort may be attacked if it is suspected of

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[41] Standard Oil Co. v. United States, 283 U.S. 163 (1931).
[42] Id. at 170.
[43] Id. at 173.
[44] 333 U.S. 287 (1948).
[45] Id. at 310.
[46] 179 F.2d 80 (9th Cir. 1949).
[47] Id. at 92.
[48] E.g., Zenith Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969).
[49] E.g., Hartford-Empire Co. v. United States, 323 U.S. 386 (1945).

lessening competition and thus slowing the pace of innovation. An example is the cross-licensing arrangement in the aircraft industry. During World War I the government was concerned that it was not getting enough airplanes for the war effort because of a concentration of vital patents in a few companies. At the instigation of the government an agreement was worked out under which the patents would be more readily available to other companies, and the legality of the arrangement was approved by the Attorney General.[50] The patent exchange arrangement was renewed after the war and has been in effect ever since. In 1972, however, the government filed suit to end the arrangement on the grounds that it violated the Sherman Act.[51] In its complaint, the government alleged that the arrangement removed competitive incentive and thus inhibited innovation in the industry.[52]

The application of the "rule of reason" to such ventures has been strongly supported by some commentators[53] and it appears to be the current attitude of the Antitrust Division of the Department of Justice. In an address prepared for delivery on May 24, 1973, Donald Baker, director of policy planning for the Division, said:

> Patent pooling or interchange arrangements are not illegal *per se* under the antitrust laws . . . . Rather, such pooling arrangements will be looked at generally in terms of impact on these twin antitrust values—competition in existing markets and competitive innovation for tomorrow's markets.[54]

If the "rule of reason" were applied to joint industry anti-pollution research, then such projects would be legal as long as they did not reduce competition between the firms involved.

The argument for "reasonableness" is very strong in the field of pollution control. The costs of pollution damage are economic "externalities" or "external diseconomies," *i.e.*, costs that are not imposed on either the manufacturer or the product user, but are imposed on society as a whole.[55] Because they are external to the market structure, the market produces no incentive for their elimi-

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[50] 31 Op. Att'y Gen. 166 (1917). See Annot., 69 A.L.R. 300, 334 (1930).

[51] United States v. Manufacturers Aircraft Ass'n, Civil No. 72-Civ. 1307 (S.D.N.Y., filed March 29, 1972). See 5 Trade Reg. Rep. ¶ 45,072, at 53,464 (1973).

[52] The suit charged that as a result of the patent-pooling and cross-licensing arrangement, competition among the defendants in the research, development, manufacture and sale of airplanes had been restricted and eliminated; competition in the purchase of airplane patents and patentable inventions had been restricted and suppressed; and the research and development of patentable inventions for airplanes had been hindered and delayed. 5 Trade Reg. Rep. ¶ 45,072, at 53,464 (1973).

[53] See, e.g., Andrews, supra note 29.

[54] 5 Trade Reg. Rep. ¶ 50,173, at 55,311 (1973).

[55] For a discussion of the economics of air pollution, see Lanzillotti & Blair, Some Economic and Legal Aspects of the Pollution Problem—The Automobile: A Case in Point, 24 U. Fla. L. Rev. 399 (1972).

nation. It is not competitively advantageous for a manufacturer to be the first to develop and install pollution control devices, because they increase the cost of his product without making the product more attractive to consumers. An individual consumer has no incentive to demand non-polluting products since although they are often more expensive they do him little good unless most other consumers also use them. In the case of automobiles, pollution control devices have other drawbacks for producers and consumers: typically they decrease performance and gas mileage.[56] Thus, the defendants in *Vehicle Air Pollution* argued that there was no incentive for the individual manufacturers to spend large amounts of money on their own to develop pollution control equipment, and therefore the joint venture was beneficial because it increased the amount of research being done.[57]

Plaintiffs contended, however, that the joint effort violated the Sherman Act because it in fact lessened competition in the field of pollution control.[58] Plaintiffs argued that there had been a substantial incentive for the individual companies to engage in pollution control research because of public awareness of the problem, and because it was likely that as new technology was developed it would be required by law on all new cars.[59] Thus a manufacturer who made a "breakthrough" stood to gain a monopoly position on patentable solutions to the pollution problem. Plaintiffs characterized the joint effort as aimed at mitigating these strong competitive incentives by ensuring that no company could profit at the expense of the others by being first with a new device.[60] Moreover, the plaintiffs alleged that defendants, as part of the conspiracy, agreed to give misleading reports to the government and the public concerning the feasibility of pollution control in order to convey a false impression of the difficulty involved in solving the problem.[61] If such activities were proved, it would suggest that the object of the cooperation was the suppression, not the development, of pollution-control technology, and thus the cooperation was not "reasonable" under the rule-of-reason test. Thus, the legality of the

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[56] 1 F. Grad, Treatise on Environmental Law § 2.04, at 2-217 (1973).

[57] See In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 5 Trade Reg. Rep. (1973 Trade Cas.) ¶ 74,819, at 95,647, 95,651 (C.D. Cal. Nov. 21, 1973); Brief for Appellees at 3-4, In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973) [hereinafter cited as Brief for Appellees]. In the General Motors Annual Report for 1969, the company said: "The industry cooperative program did not delay progress toward finding solutions to the difficult technological problems of motor vehicle air pollution. In fact, it accelerated the progress which has been made." Quoted in L. Jaffe & L. Tribe, Environmental Protection 164 (1971).

[58] Brief for Appellees, supra note 57, at 4.

[59] Id.

[60] Id.

[61] See Kaufman, Suppressing Technology: The Automobile Air-Pollution Case, 3 Antitrust L. & Econ. 111, 124-25 (1970).

arrangement was a question of fact, determinable only upon a trial on the merits, which did not occur in this case.

THE REMEDIES

The Clayton Act provides for suits for treble damages by anyone who is "injured in his business or property" by a violation of the antitrust laws.[62] Equitable relief is available under the Act to prevent "threatened loss or damage by a violation of the antitrust laws."[63] In *Vehicle Air Pollution* the courts were faced with a situation in which the "damage," although possibly falling within the literal words of the statute, was of a type that was certainly not contemplated by the Congress that passed it. In prior cases, the "injury" involved was economic injury suffered as a result of transactions in the marketplace. The plaintiff had lost profits because of a competitive disadvantage,[64] for example, or had lost money because of overcharges caused by price-fixing or a monopolistic seller.[65] *Vehicle Air Pollution* presented a different situation, however. The automobile manufacturers were allegedly acting to avoid a diminution of profits that would have resulted from the installation of pollution control devices, and in doing so allegedly inflicted upon the community as a whole damages caused by their polluting product. The damage from pollution does not arise from a transaction in the marketplace; it does not result from a commercial relationship between plaintiff and defendant. The question presented to the courts was whether the antitrust laws were broad enough to encompass such damage allegedly caused by an antitrust conspiracy.

DAMAGES

Although on its face the Clayton Act seemingly provides for recovery of treble damages by all those injured by an antitrust violation, the courts have consistently limited the class of potential plaintiffs who have standing to sue by judicially glossing the words "injured in his business or property" and "by reason of an antitrust violation" in section 4 of the Act.[66] Injury to "business or property" has been held to mean only injury to "commercial interests."[67] Of

[62] 15 U.S.C. § 15 (1970).

[63] 15 U.S.C. § 26 (1970).

[64] E.g., Zenith Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 118-19 (1969).

[65] E.g., Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 395 (1906).

[66] Hawaii v. Standard Oil Co., 405 U.S. 251, 262-63 n.14 (1972); In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 126-29 (9th Cir. 1973). See generally Pollock, The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action, 57 Nw. U.L. Rev. 691 (1963); Timberlake, The Legal Injury Requirements and Proof of Damages in Treble Damage Actions Under the Antitrust Laws, 30 Geo. Wash. L. Rev. 231 (1961); Comment, 64 Colum. L. Rev. 570 (1964); Comment, 77 Dick. L. Rev. 73 (1972).

[67] Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972).

the plaintiffs in *Vehicle Air Pollution,* the court of appeals held that only the class of farmers met this test.[68] The gloss on "by reason of" has taken two different forms. Some courts have held that a plaintiff is not injured "by reason of" an antitrust violation if his injury is not "direct," that is, if it results from injury to another who is more "directly" harmed.[69] Other courts have formulated the "target area" test, under which a plaintiff cannot recover if he is outside the area of the economy deemed to be the "target area" of the conspiracy.[70] The application of the two theories has led to some confusion as courts attempt to articulate the limitation on the class of potential treble-damage plaintiffs. Decisions often blend the two theories,[71] and one circuit has found only a scant difference between them.[72] The Supreme Court has never directly ruled on the validity of these judge-made limitations. Language in some decisions had suggested that the Court might take a more liberal view of antitrust standing,[73] but in *Hawaii v. Standard Oil Co.*,[74] the majority noted with apparent approval: "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."[75]

The Ninth Circuit subscribes to the "target area" view, and it denied standing to the farmers in *Vehicle Air Pollution* because they were outside of the "target area," which the court described as the area "concerned with research, development, manufacture, installation and patenting of automotive air pollution control devices."[76] The court did not discuss the novelty of the question of

[68] In re Multidistrict Air Pollution M.D.L. No. 31, 481 F.2d 122, 126 (9th Cir. 1973).

[69] E.g., Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727, 732-34 (3d Cir. 1970), cert. denied, 401 U.S. 974 (1971); Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 394-95 (6th Cir. 1962); Snow Crest Beverages v. Recipe Food, 147 F. Supp. 907, 909 (D. Mass. 1956).

[70] E.g., Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073, 1076 (9th Cir. 1970); Hoopes v. Union Oil Co., 374 F.2d 480, 485 (9th Cir. 1967); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952).

[71] See, e.g., Reibert v. Atlantic Richfield Co., 471 F.2d 727, 730-31 (10th Cir. 1973); Fields Productions, Inc. v. United Artists Corp., 318 F. Supp. 87, 88 (S.D.N.Y. 1969), aff'd mem., 432 F.2d 1010 (2d Cir. 1970).

[72] Nationwide Auto Appraiser Serv. v. Association of C. & S. Co., 382 F.2d 925 (10th Cir. 1967).

[73] E.g., Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (per curiam), where the Court said:

> Congress having thus prescribed the criteria of the prohibition, the courts may not expand them. Therefore, to state a claim upon which relief can be granted under [section 1 of the Sherman Act], allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires.

Id. at 660. See also Radovich v. National Football League, 352 U.S. 445, 453-54 (1957); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948).

[74] 405 U.S. 251 (1972).

[75] Id. at 262-63 n.14.

[76] In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 129 (9th Cir. 1973).

allowing an action for damages caused by pollution under the antitrust laws, but instead dealt with the problem in traditional standing terms.

It is submitted that this analysis obscures the problem of whether the antitrust laws should be available at all to redress pollution-caused injuries arising from an anticompetitive conspiracy. Neither the "direct injury" nor the "target area" tests are sufficient to answer this question. Pollution damage is always "direct," that is, it is never derivative of injury to another, and the "target area" limitation has little meaning when applied to pollution-damaged plaintiffs. The "target area" has been described as the "area of the economy which is endangered by a breakdown of competitive conditions in a particular industry,"[77] or "the area which it could reasonably be foreseen would be affected"[78] by the violation. In the case of pollution damage, this would seem to be the community as a whole.

A better analysis would have emphasized that the issue was whether damages caused by pollution should be recoverable at all under the antitrust laws. In view of the genesis of antitrust legislation, and its fundamental purpose as it has been articulated by the courts, it is submitted that they should not be. In *Hawaii* the Supreme Court held that such damages were limited to "commercial interests."[79] This holding should have barred recovery by the farmers as well as by the other plaintiffs in *Vehicle Air Pollution,* because their damage, although to a "commercial interest," was not really "commercial damage" at all because it did not result from any *commercial relationship* with the defendants. In *United States v. Topco Associates, Inc.*,[80] the Supreme Court summarized the goal of the antitrust laws:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete . . . .[81]

Pollution is not a balance-sheet item, and the remedy of treble damages under the antitrust laws does not seem to be an appropriate way to deal with it. The court of appeals should have denied the farmers recovery not because of an application of the "target area" test, but because pollution damage is not the kind of commercial injury that the antitrust laws were enacted to redress.

[77] Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 55 (9th Cir. 1951).
[78] Hoopes v. Union Oil Co., 374 F.2d 480, 485 (9th Cir. 1967).
[79] 405 U.S. at 264.
[80] 405 U.S. 596 (1972).
[81] Id. at 610.

EQUITABLE RELIEF

Although it denied the plaintiffs in *Vehicle Air Pollution* standing to seek damages, the Ninth Circuit determined that the plaintiffs did have standing to seek equitable relief. Noting that section 16 of the Clayton Act does not contain the "injury to business or property" language of section 4, the court held that plaintiffs had alleged threatened loss or damage to "interests cognizable in equity," and that was all that section 16 required of them.[82] The court emphasized, however, that it did not reach the question of whether the equitable relief requested by plaintiffs was available.[83] The district court found that such equitable relief was not available,[84] but the opinion contains an important ambiguity. It is not clear whether relief was denied because no antitrust violation was found, or because the kind of equitable relief requested was outside the scope of the antitrust laws. If the former is the basis of the decision, it is submitted that it is incorrect. The basis of the alleged violation has already been discussed.[85] In dismissing the claims, the district court reasoned that the defendants had been "competing . . . in the manufacture of automobiles for sale to the American public,"[86] and that smog was the result of this competition, because such competition increased the demand for, and thus the sales of, automobiles.[87] However, the fact that the companies involved were competing against each other in general does not mean that they could not have been engaged in anticompetitive conduct in the specific area of pollution control. Plaintiffs sought to prove that defendants conspired to eliminate competition in that one area in order that all their profits would be enhanced. If proved, such collusion would be an antitrust violation regardless of the fact that each manufacturer was trying to outsell its rivals. When competing manufacturers conspire to fix prices, for example, such conduct is illegal despite the fact they continue to engage in kinds of competition other than price competition.[88] Plaintiffs also alleged that *but for* the defendants' violation, cars would have been produced with pollution control devices, and air pollution would have been lessened.

[82] 481 F.2d at 130. The court cited for this proposition Bratcher v. Akron Area Bd. of Realtors, 381 F.2d 723 (6th Cir. 1967), where plaintiffs alleged an antitrust conspiracy by the Board and others aimed at denying housing to Negroes and sought an injunction under § 16 to end the conduct. The defendants argued that the antitrust laws were not intended to be used as an instrument to enforce civil rights. The Department of Justice, as amicus curiae, argued that the complaint did state a claim under the antitrust laws. However, the propriety of the claim was not reached by the court, which deferred a decision until a further hearing on the facts in the district court.

[83] 481 F.2d at 131.

[84] 5 Trade Reg. Rep. (1973 Trade Cas.) ¶ 74,819, at 95,652.

[85] See text at notes 29-59 supra.

[86] 1973 Trade Cas. at 95,651.

[87] Id.

[88] See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927); Plymouth Dealers' Ass'n v. United States, 279 F.2d 128, 132 (9th Cir. 1960).

The preferable rationale for the district court's decision is that relief was denied because redress for a market externality like pollution damage is not available under the antitrust laws, whose function is exhausted when the market is restored to a competitive condition. This function was fulfilled in *Vehicle Air Pollution* by the government's consent decree. The district court noted that equitable relief under section 16 has been granted "to undo what could have been prevented" or "to cure the ill effects of the illegal conduct."[89] The court concluded, however, that in the entire history of the antitrust laws, equitable relief has without exception been aimed at the restoration of a competitive marketplace;[90] smog, therefore is not "an evil the cure to which is found in section 16 of the Clayton act."[91]

Section 16 of the Clayton Act reads, in part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . .[92]

Vehicle Air Pollution presented a novel problem, differing from the traditional situation where the damage to the plaintiff ceased when the anticompetitive conduct was prevented or ended. In the past, suits for injunctions under this section have been directed at *conduct* as described in the statute.[93] In *Vehicle Air Pollution,* however, plaintiffs sought affirmative action to redress the result of the conduct, rather than to merely enjoin the prohibited conduct. That the only function of the section is the cessation of conduct is suggested by dicta in *United States v. Oregon State Medical Society,*[94] where a unanimous Supreme Court stated:

> It will simplify the consideration of such cases as this to keep in sight the target at which relief is aimed. *The sole function of an action for injunction is to forestall future violations.* . . . All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to continue or recur. This established, it adds nothing that the calendar of years gone by might have been filled with transgressions.

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[89] 1973 Trade Cas. at 95,649.

[90] Id. at 95,652.

[91] Id.

[92] 15 U.S.C. § 26 (1970).

[93] E.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969); Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3d Cir. 1962).

[94] 343 U.S. 326 (1952).

> Even where relief is mandatory in form, it is to undo existing conditions, because otherwise they are likely to continue.[95]

This view is also suggested by *Zenith Corp. v. Hazeltine Research, Inc.*,[96] where the Court said that to make out a case for relief, the plaintiff "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur."[97] The language of the section itself supports this view, since it refers to relief from "threatened conduct." The language of section 4 of the Sherman Act,[98] describing the equitable jurisdiction of the federal courts in civil actions brought by the government, lends further support to the view that the equitable relief contemplated is only aimed at prohibiting future conduct. That section reads in part:

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations . . . .[99]

This language suggests that the equitable remedy is aimed at halting present, or preventing future, conduct. The legislative history of section 16 indicates that its purpose was to give private plaintiffs the same kind of injunctive relief that was available to the government.[100]

The view that section 16 does not provide the type of relief requested in *Vehicle Air Pollution* also finds support in the position taken by the Supreme Court in *Hawaii*. Granting the affirmative relief requested by plaintiffs in *Vehicle Air Pollution* might be interpreted as sufficiently similar to pure monetary damages in its impact on the defendants to justify the application of the limitation on standing contained in section 4 to the claim for equitable relief.

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[95] Id. at 333 (emphasis added).

[96] 395 U.S. 100 (1969).

[97] Id. at 130.

[98] 15 U.S.C. § 4 (1970).

[99] Id.

[100] During the discussion of the bill the following exchange occurred:

Senator Nelson: I desire to call the attention of the Senator from Tennessee . . . to the fact that under the original antitrust act of 1890 only the Government . . . can obtain injunctive relief. By section [16] of this bill for the first time the same remedy is given to private parties as was given to the Government . . . .

Senator Shields: Section [16] authorizes persons and corporations to bring suits in equity against those violating the antitrust laws in all things, as section 4 authorizes the Government to do so.

51 Cong. Rec. 14,214-15 (1914).

Part of the prayer for relief requested the equitable remedy of restitution, under which defendants would have had to reimburse the plaintiffs for expenses plaintiffs had incurred in fighting the pollution problem caused by the alleged conspiracy.[101] The Supreme Court has sometimes inferred the availability of such equitable remedies in the context of a federal statute,[102] but there are countervailing considerations in the antitrust laws. Under section 4 a limit has been placed on the class of potential treble damage plaintiffs. In *Hawaii,* the Court differentiated between suits for damages and suits for an injunction on the basis that one injunction, barring the anticompetitive conduct, would be as effective as 100, whereas there was a danger of duplicative treble damage actions.[103] If damages were recoverable under a restitution theory it would circumvent the restrictions placed on damage recoveries by section 4.

Mandatory injunctions, requiring affirmative action on the part of the defendant, *have* issued under section 16. Such injunctions, however, have been limited to undoing a violation, and thus ending the anticompetitive *conduct.* This occurs when a company is ordered to divest a subsidiary acquired in a violation of the antitrust laws.[104] In *Ford Motor Co. v. United States,*[105] the Supreme Court approved equitable relief that required, in addition to the divestiture of a spark-plug company, that Ford purchase one-half of its requirement of spark plugs from the divested plant for five years, and that Ford protect the employees of the divested company by conditioning the divestiture sale on the purchaser's assurance that it would honor existing wage and pension plans and offer employment to workers displaced by the shift.[106] All these measures, however, were aimed at establishing the divested plant as a viable competitor in the industry, and thus undoing the anticompetitive effects of the illegal merger.[107] In *Vehicle Air Pollution,* the anticompetitive conduct had already been barred by the government's consent decree, so the traditional equitable relief had been exhausted. Thus the affirmative relief requested by plaintiffs would have been a distinct departure from antitrust precedent. As already noted, though, *Vehicle Air Pollution* presented a novel situation. In the past, when the anticompetitive conduct was ended, so was the damage to plaintiffs. In this case, however, the damage—air pollution from cars unequipped with pollution control devices—continued despite the end of the alleged conspiracy. Therefore the damage could be redressed

[101] Memorandum of Plaintiffs on Equitable Relief at 25, In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 5 Trade Reg. Rep. (1973 Trade Cas.) ¶ 74,819, at 95,647.

[102] Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288 (1960); United States v. Moore, 340 U.S. 616 (1951); Porter v. Warner Co., 328 U.S. 395 (1946).

[103] 405 U.S. at 261.

[104] E.g., Ford Motor Co. v. United States, 405 U.S. 562 (1972).

[105] 405 U.S. 562 (1972).

[106] Id. at 572.

[107] Id. at 575.

only by an order that would have compelled defendants to fit the cars with pollution-control devices, as requested by the plaintiffs. Rather than extending the law to grant relief, however, the district court chose to take a more limited view of the antitrust laws.

There are several theories regarding the proper approach that a court should take when faced with the prospect of applying a statute to a situation that was clearly never contemplated by the legislature that enacted it.[108] Perhaps the most persuasive is the view that the court should attempt to decide whether the application will further the policy that the legislature had in mind when it enacted the law in question.[109] In *Vehicle Air Pollution* the district court might have allowed the requested equitable relief if it had determined that the antitrust laws were aimed at redressing all harm inflicted on the community by violations of the antitrust laws, and that anyone who had suffered any injury had standing to sue. Instead, the court held that antitrust laws were passed only to ensure a competitive situation in the marketplace and to protect those who are economically damaged in their commercial relationship with violators.

In addition, a different decision would have raised grave questions about the proper role of the courts in the air pollution controversy. Judicial recognition of the proper role of the courts vis-à-vis the legislature is evident in *City of Chicago v. General Motors Corp.*,[110] a case stemming from the same facts as *Vehicle Air Pollution*. In that case, the City of Chicago attempted to bring a class action on behalf of its citizens to force the automobile companies to "retrofit" used cars with pollution control devices. The suit was based on the Illinois common law of products liability and was brought in federal court as a diversity action. The district court dismissed, holding that:

> While the state and federal governments may not be moving as swiftly as plaintiff would like in this area, the fact remains that legislative and administrative guidelines and programs have been initiated. It would be improper for this Court to exercise its equitable jurisdiction to interfere with the comprehensive programs designed to solve a complex social economic and technological problem.[111]

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[108] Compare Landis, A Note on "Statutory Interpretation," 43 Harv. L. Rev. 886 (1930), with Radin, Statutory Interpretation, 43 Harv. L. Rev. 863 (1930). See also Horack, The Disintegration of Statutory Construction, 24 Ind. L.J. 335 (1949); A Symposium on Statutory Construction, 3 Vand. L. Rev. 365 (1950).

[109] See United States v. Brown, 333 U.S. 18, 26 (1948); Johnson v. Southern Pac. Co., 196 U.S. 1, 18 (1904).

[110] 332 F. Supp. 285 (N.D. Ill. 1971), aff'd, 467 F.2d 1262 (7th Cir. 1972). The circuit court noted that federal legislation has preempted the field of new-car emissions since 1968. As for the cars produced before that date, the court held that the complaint failed to state a claim under a strict liability theory, because the test of what is an unreasonably dangerous product must be applied to each unit "and not to the gross effect of an indefinite conglomerate of products manufactured by several manufacturers." 467 F.2d at 1267.

[111] 332 F. Supp. at 291.

Because the automobiles produced by defendants were not equipped with pollution control devices, they cost less, performed better, and used less gasoline. To a resident of an area where the pollution problem is minimal, these considerations would outweigh the benefits of the devices. Retrofit ordered under section 16 would ignore these regional differences. Under the Air Quality Act of 1967[112] the federal government has preempted the regulation of new-car emissions in every state but California.[113] The states, however, retain the power to regulate the emissions from used cars.[114] Thus states where the pollution problem is greatest have the option of requiring pollution control devices to be installed. Such measures impose the cost of pollution control on the users of automobiles, which does not seem inappropriate, since the cost would have been borne by car users had the devices been installed in earlier years. A decision for the plaintiffs in this case would have imposed the cost on the automobile industry, which would then have passed it on to future car buyers. Any proposed solution to the automobile pollution problem involves a decision as to who will bear the cost. Congress has considered legislation that would have required automobile manufacturers to "retrofit" used cars with pollution control devices, as well as a proposal that the government subsidize the retrofit (thus distributing the cost to all taxpayers). Both proposals were rejected.[115] It is submitted that the decisions in *Vehicle Air Pollution* were correct in leaving to the legislative branch the decision of where the burden of paying for pollution control should fall.[116]

HARRY H. WISE III

Environmental Law—Admiralty Law—Validity of States' Oil Pollution Sanctions—*Askew v. American Waterways Operators, Inc.*[1]—Plaintiffs, merchant shippers, world shipping associations, members of the Florida coastal barge and towing industry, and owners and operators of oil terminal facilities and heavy industries located in Florida, brought suit in the United States District Court for the Middle District of Florida to enjoin application of the Florida Oil Spill Prevention and Control Act (the Florida Act).[2] Officials

[112] 42 U.S.C. §§ 1857-57*l* (1970).

[113] 42 U.S.C. § 1857f-6A(a) (1970).

[114] See Comment, The Clean Air Amendments of 1970: Better Automotive Ideas from Congress, 12 B.C. Ind. & Com. L. Rev. 571, 597 (1971).

[115] Id. at 598, citing S. Rep. No. 1196, 91st Cong., 2d Sess. 13 (1970).

[116] Under the Clean Air Amendments of 1970, Congress provided for mandatory licensing of pollution-control equipment where there is a danger that one manufacturer might achieve a monopoly because of its advancement in pollution-control technology. 42 U.S.C. § 1857h-6 (1970). Thus Congress provided an arrangement similar to the one attacked by the Justice Department in *Vehicle Air Pollution*.

[1] 411 U.S. 325 (1973).

[2] Fla. Stat. Ann. §§ 376.011-.21 (Supp. 1972). 355 F. Supp. 1241 (M.D. Fla. 1971); see